

OPEN MEETING ITEM



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COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE



ARIZONA CORPORATION COMMISSION

ORIGINAL

DATE: JULY 14, 2008

DOCKET NO: RR-02635B-07-0437

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Marc E. Stern. The recommendation has been filed in the form of an Opinion and Order on:

BURLINGTON NORTHERN AND SANTA FE RAILWAY (UPGRADE CROSSING)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

JULY 23, 2008

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

JULY 29, 2008 AND JULY 30, 2008

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MIKE GLEASON - Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 KRISTIN K. MAYES
7 GARY PIERCE

8 IN THE MATTER OF THE APPLICATION OF
9 THE ARIZONA DEPARTMENT OF
10 TRANSPORTATION TO UPGRADE AN
11 EXISTING CROSSING OF THE BURLINGTON
12 NORTHERN AND SANTA FE RAILWAY AT
13 35TH AVENUE AND U.S. 60 IN THE CITY OF
14 PHOENIX, MARICOPA COUNTY, ARIZONA,
15 AT AAR/DOT NO. 025-425-K.

DOCKET NO. RR-02635B-07-0437

DECISION NO. _____

11 OPINION AND ORDER

12 DATES OF HEARING:

October 11, 2007 and May 27, 2008

13 PLACE OF HEARING:

Phoenix, Arizona

14 ADMINISTRATIVE LAW JUDGE:

Marc E. Stern

15 APPEARANCES:

Mr. James R. Redpath, Assistant Attorney General, on
behalf of the Arizona Department of Transportation;

16 Mr. Patrick J. Black, Fennemore Craig, PC, on behalf of
17 the Burlington Northern and Santa Fe Railway;

18 Mr. Daniel L. Brown, Assistant Chief Counsel, on
behalf of the City of Phoenix; and

19 Mr. Charles Hains and Ms. Kenya Collins, Staff
20 Attorneys, Legal Division, on behalf of the Safety
Division of the Arizona Corporation Commission.

21 **BY THE COMMISSION:**

22 On July 24, 2007, the Arizona Department of Transportation ("ADOT") filed with the
23 Arizona Corporation Commission ("Commission") an application for approval for the Burlington
24 Northern and Santa Fe Railway Company ("Railroad") to upgrade an existing crossing at the
25 Railroad's tracks at 35th Avenue and U.S. 60, in Phoenix, Arizona, at AAR/DOT No. 025-425-K
26 ("Application").

27 On August 1, 2007, by Procedural Order, the proceeding was scheduled for hearing on
28 September 18, 2007, and other procedural dates for filing and public notice were set.

1 On September 11, 2007, the Hearing Division was notified that ADOT had not published
2 public notice by August 24, 2007, as ordered in the Commission's Procedural Order.

3 On September 12, 2007, by Procedural Order, the hearing scheduled on September 18, 2007,
4 was continued to October 11, 2007, and new procedural dates for filings and public notice were
5 established.

6 Prior to the hearing, ADOT filed certification of public notice pursuant to the Commission's
7 September 12, 2007, Procedural Order.

8 On October 11, 2007, a full public hearing was convened before a duly authorized
9 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Commission's
10 Railroad Safety Section of the Safety Division ("Staff") appeared with counsel. At the conclusion of
11 the hearing, the matter was taken under advisement pending submission of a Recommended Opinion
12 and Order ("ROO") to the Commission.

13 On November 5, 2007, the Initial ROO was issued by the presiding Administrative Law Judge
14 for consideration by the Commission. Several substantive amendments were presented by
15 Commissioners Mayes and Pierce. After consideration of the Initial ROO and the proposed
16 amendments at the December Open Meeting, due to the issues raised by the proposed amendments to
17 the Initial ROO, and in order to allow the Railroad, the City of Phoenix ("City") and ADOT to
18 present evidence, it was determined that an additional hearing was necessary.

19 On January 15, 2008, by Procedural Order, the Railroad and Staff were ordered to prepare and
20 file a joint recommendation listing possible dates for hearing and to provide the names and mailing
21 addresses of any other entities whether private or governmental that should be added to the service
22 list to be provided notice of the hearing on this Application. The Railroad and Staff were further
23 ordered to provide the name and address of all road authorities for the crossing, and to pre-file, on a
24 date to be established, testimony concerning the issues raised by the proposed amendments to the
25 Recommended Opinion and Order to further develop the record at a future hearing.

26 On March 28, 2008, the Railroad and Staff filed a Joint Stipulation and Request for
27 Procedural Conference ("Stipulation") which stated that the proceeding required the participation of
28 the applicant, ADOT, and the City, which is the road authority for the 35th Avenue crossing. The

1 Stipulation filed by the parties further requested that a procedural conference be scheduled to discuss
2 the scope and substance of issues to be addressed in the hearing.

3 On April 1, 2008, by Procedural Order, a procedural conference was scheduled for April 30,
4 2008, with notice also provided to the City and ADOT.

5 On April 30, 2008, the Railroad, the City, ADOT and Staff appeared with counsel. The
6 parties discussed the status of the proceeding and their respective positions with respect to the
7 Application and the proposed amendments to the ROO. All parties indicated their support for the
8 Initial ROO as drafted and their desire that it be approved so that the planned upgrades could be
9 completed as soon as possible. The parties further agreed that a hearing be scheduled in the near
10 future so that their testimony could be taken in support of the Application and any other concerns of
11 the Commission be addressed.

12 On May 1, 2008, by Procedural Order, a hearing was scheduled for May 27, 2008.

13 On May 27, 2008, the hearing was reconvened before the Commission's Administrative Law
14 Judge in Phoenix, Arizona. The Railroad, ADOT, the City and Staff were present with counsel.
15 After the taking of additional evidence, the hearing was concluded pending the filing of memoranda
16 by the Railroad and Staff concerning the manner of cost allocation for the installation of automatic
17 warning devices.

18 * * * * *

19 Having considered the entire record herein and being fully advised in the premises, the
20 Commission finds, concludes, and orders that:

21 **FINDINGS OF FACT**

22 1. On July 24, 2007, ADOT filed an Application in which it requested an Opinion and
23 Order from the Commission approving an agreement between ADOT and the Railroad to upgrade the
24 existing public at-grade crossing on 35th Avenue where it crosses the Railroad's tracks and intersects
25 with Indian School Road and Grand Avenue which runs parallel to the Railroad's tracks in Phoenix,
26 Arizona at AAR/DOT No. 025-425-K.

27 ...
28

1 2. The agreement between ADOT and the Railroad provides for improvements to be
2 made in the following manner: by relocating and replacing the existing cantilevers which extend
3 above and over the crossing with new longer cantilevers; by replacing the old flashing lights with
4 new 12-inch LED automatic flashing lights; and by adding new striping on the roadway. New signs
5 which read "Do Not Stop On Tracks" will also be erected.

6 3. Pursuant to the Commission's Procedural Orders, ADOT provided all interested
7 parties with notice of the Application and hearing thereon by certified mail and publication in the
8 *Arizona Republic*.

9 4. The hearing was held on October 11, 2007, and reopened on May 27, 2008.

10 5. According to the report filed by Staff, the improvements described in this proceeding
11 should help to improve public safety at the crossing in the future.

12 6. At the October hearing, both Staff witnesses, Chris Watson, Grade Crossing Inspector,
13 and Brian Lehman, Supervisor of the Railroad Safety Section, related that it is not feasible to
14 construct a grade separation at the crossing site due to the estimated expense of from \$40 million to
15 more than \$50 million. Mr. Lehman testified that the cost of similar grade-separated crossings, such
16 as Bethany Home Road at Grand Avenue, cost approximately \$55 million due to factors such as right
17 of way acquisition, business relocations and construction expenses. (Tr. at p. 20)

18 7. Mr. Watson testified that the City of Phoenix does not want automatic gates
19 constructed at the crossing because they could impair traffic flow during rush hours on what is the
20 confluence of three major high volume roadways (Indian School Road, 35th and Grand Avenues).
21 According to Mr. Watson, in 2005, ADOT recorded a total of approximately 56,800 vehicle crossings
22 a day. ADOT did not provide Staff with any traffic projections for the crossing in the future. (Tr. at
23 p. 14 and 15)

24 8. In January 2007, because of the number of accidents at the crossing,¹ Staff met on-site
25 with Phoenix traffic engineers, representatives of ADOT and the Railroad and proposed other safety
26 upgrades including the following: the installation of traffic medians; automatic gates; traffic pre-

27
28 ¹ According to the Staff Report, since 1972, there have been 83 accidents at the crossing, with 25 injuries and one fatality.

1 signals to prevent traffic from stopping on the tracks; and upgrades to signage and roadway stripes.

2 9. In consideration of Staff's recommendations, the signage improvements and new
3 stripes were added to the planned upgrade of the new cantilevers and flashing LED lights. However,
4 Staff continues to recommend its earlier proposals from January 2007 to further improve public
5 safety at the crossing. Staff did not explain how its additional proposed upgrades would be funded.

6 10. Mr. Watson testified that the cost apportionment for the installation of the crossing
7 upgrade as provided in the Application is proper and approximately \$208,000 will be paid solely by
8 ADOT from funds provided by the Federal Highway Administration to upgrade Railroad crossings
9 on public roadways which are not primarily for the benefit of the Railroad.

10 11. Federal funding to Arizona annually totals approximately \$2.5 million and is applied
11 by ADOT to crossings needing upgrades throughout Arizona. In light of the fact that there are
12 approximately 1,800 crossings in Arizona, the extent of the funds available for each upgrade project
13 is limited.

14 12. In the initial proceeding, Staff recommended that the Application be approved and that
15 in the future Staff would closely monitor this crossing for possible upgrade opportunities.

16 13. At the Commission's Open Meeting on the matter, Commissioner Pierce offered an
17 amendment that the Railroad be held responsible for 50 percent of the cost of the upgrade. Mr.
18 Watson had testified that a cantilever at the 35th Avenue crossing was not in compliance with
19 Commission standards and those of the Manual on Uniform Traffic Control Devices after the
20 Railroad tore out some track at the 35th Avenue crossing and did not reposition the cantilever a few
21 years ago. The Railroad was not present at the initial hearing, and, therefore, no explanation for its
22 inaction was offered.

23 14. At the Open Meeting, Commissioner Mayes also offered an amendment directing
24 Staff to make recommendations to the Commission concerning changes to the crossing which could
25 include, but not be limited to, requiring the City and the Railroad to construct automatic gates and
26 install video camera enforcement at the crossing.

27 15. After due consideration of the Initial ROO and the proposed amendments at the
28 December Open Meeting, it was determined that an additional hearing was necessary on the issues

1 raised in the proposed amendments to the Initial ROO, and in order to allow the Railroad, the City
2 and ADOT to present evidence.

3 16. At the reopened hearing on May 27, 2008, Mr. Bruce Vana, an engineer and ADOT's
4 Manager of the Utility Railroad section, testified that ADOT "would like to proceed with the project
5 as originally planned." (RTR at p. 10)

6 17. Mr. Vana confirmed that ADOT has entered into a contract with the Railroad to
7 upgrade the crossing pursuant to 23 U.S.C. § 130 and under the terms of the contract, ADOT, using
8 all federal funds, is paying 100 percent of the costs of the upgrade.

9 18. Mr. Vana related that, since the City is the road authority for the crossing, ADOT
10 would not be responsible for any additional upgrades such as automatic gates or video camera
11 enforcement. (RTR at p. 14)

12 19. Mr. John Shurson, the Assistant Director of Public Projects/Western Region for the
13 Railroad, confirmed that the Railroad supports the Initial ROO in the proceeding.

14 20. With respect to Commissioner Pierce's proposed amendment, Mr. Shurson explained
15 that the track, which had been removed, was a commercial or spur track and was removed because it
16 was no longer needed by the customer. Mr. Shurson did not deny that after the removal of the track,
17 the cantilever was out of position and in noncompliance. He had no reason for why the cantilever
18 was permitted to remain in its former position until the Railroad moved it to the correct position
19 about six to eight months ago, after the issue of noncompliance was raised in the initial hearing on the
20 Application. (RTR at p. 21)

21 21. Mr. Shurson testified further that after the spur track had been removed, the Railroad's
22 agreement with ADOT was executed on May 26, 2006. The agreement called for the actual
23 replacement of the cantilever, but due to unanticipated delays the project did not go forward as
24 expected in a timely fashion. (RTR at p. 26)

25 22. With respect to Commissioner Mayes' proposed amendment, Mr. Shurson testified
26 that the Railroad "supports video enforcement at highway/rail grade crossings." (RTR at p. 19)

27 23. Video enforcement requires an agreement with the road authority, which in this case is
28 the City. (RTR at p. 19)

1 24. Mr. Shurson testified that the Railroad "would support a pilot project and would
2 partially fund a pilot project for video enforcement at 35th and/or others in the City . . .", but the
3 amount "would be open for negotiation." (RTR at p. 19 and 20)

4 25. Mr. Shurson indicated that he was aware of one crossing with video enforcement.
5 According to Mr. Shurson, it is a crossing of the Union Pacific Railroad Company located in
6 Grandview, Texas. He believes it was initially a great financial success for the road authority, but as
7 drivers became aware of the camera installation, violations decreased, the crossing became safer, and
8 the financial returns for the road authority decreased.

9 26. Mr. Michael Cynecki, a traffic engineering supervisor in the City's Street
10 Transportation Department who oversees the Traffic Signal Section for the City, testified that the
11 City has instituted a study to see if any improvements could be made at the crossing that could be
12 operated in conjunction with the traffic signal. (RTR at p. 29)

13 27. Mr. Cynecki described the intergovernmental contract which the City entered into
14 with ADOT on May 15, 2007, and called for ADOT to contract with the Railroad to make the
15 improvements described in the Application at the 35th Avenue crossing and the Railroad being paid
16 with 100 percent federal funds at a total cost of \$208,007. Mr. Cynecki reiterated that the City
17 supports the recommended Initial ROO. (RTR at p. 32)

18 28. Mr. Cynecki reviewed crash data for the crossing for the year 2007 and indicated that
19 the City found only four accidents at the crossing, none of which involved serious injury.
20 (RTR at p. 33)

21 29. The City is concerned that any more delays on improving the crossing could result in
22 higher costs for the improvements and wants to have the improvements made as soon as possible.

23 30. Mr. Cynecki also described a \$48,000 contract which the City entered on April 29,
24 2008, with Lee Engineering ("Lee") for a study to evaluate both the 35th Avenue and Grand and the
25 27th Avenue and Grand crossings of the Railroad to determine how they can best be operated for
26 efficiency and safety. (RTR at p. 34)²

27 _____
28 ² It is estimated that the study will not be completed until approximately August 2008 and the results will then be
presented to City Council for additional study and review.

31. Part of the Lee Study will review the possibility for the installation of gates, pre-signals and queue cutter signals and how best to operate them to address safety concerns at the intersection where the crossing is located. (RTR at p. 36)

32. Mr. Cynecki further testified that to add an additional study to address camera enforcement at the 35th Avenue crossing would further delay and add more expense to the study. (RTR at p. 43)

33. Patrick Hofmann is a City police lieutenant with the traffic bureau who is in charge of the South Resource Traffic Bureau and he is the project manager for the City's enforcement program. He oversees the activities of the City's vendor, American Traffic Solutions ("ATS"), and he testified about the City's current photo enforcement program and its cost to the City of approximately \$78,000 per month. The program, according to Lt. Hofmann, actually results in a loss of approximately \$395,000 a year to the City. (RTR at p. 47, 48 and 50)

34. Lt. Hofmann testified that to add photo enforcement at the crossing would add more expense to the City's contract with ATS and would have to be approved by the City Council. (RTR at p. 48 and 49)

35. In concluding the testimony at the reconvened May 27, 2008 hearing, Mr. Lehman reiterated that Staff believes the proposed upgrades should be approved “regardless of what other enhancements are made in the future at the crossing.” (RTR at p. 61)

36. Mr. Lehman indicated that Staff will monitor the Lee Study being done for the City and will make additional recommendations to the Commission if further improvements are warranted at the 35th Avenue crossing.

37. Staff's recommendation is reasonable and should be approved.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and over the subject matter of the Application pursuant to Article XV of the Arizona Constitution and A.R.S. §§ 40-336, 40-337 and 40-337.01.

2. Notice of the Application was provided in accordance with the law.

1 3. Installation of the crossing upgrade is necessary for the public's convenience
2 and safety.

3 4. Pursuant to A.R.S. §§ 40-336 and 40-337, the Application should be approved as
4 recommended by Staff.

5 5. After installation of the crossing, the Railroad should maintain the crossing in
6 accordance with A.A.C. R14-5-104.

ORDER

8 IT IS THEREFORE ORDERED that the Arizona Department of Transportation's Application
9 is hereby approved.

10 IT IS FURTHER ORDERED that the Burlington Northern and Santa Fe Railway Company
11 shall complete the crossing upgrades as described in the Application within fifteen months from the
12 effective date of this Decision.

13 IT IS FURTHER ORDERED that the Burlington Northern and Santa Fe Railway Company
14 shall notify the Commission, in writing, within ten days of both the commencement and the
15 completion of the crossing upgrade, pursuant to A.A.C. R14-5-104.

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1 IT IS FURTHER ORDERED that upon completion of the crossing upgrade, the Burlington
2 Northern and Santa Fe Railway Company shall maintain the crossing in compliance with
3 A.A.C. R14-5-104.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
6
7

8 CHAIRMAN _____ COMMISSIONER _____

9
10 COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER _____

11
12 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
13 Director of the Arizona Corporation Commission, have
14 hereunto set my hand and caused the official seal of the
Commission to be affixed at the Capitol, in the City of Phoenix,
this _____ day of _____, 2008.

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16 _____
17 BRIAN C. McNEIL
EXECUTIVE DIRECTOR

18
19 DISSENT _____
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21
22 DISSENT _____
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MES:db
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